No. 10235

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOR W. HENRICKSON, Acting Collector of Internal Revenue, *Appellant*,

vs.

RICHARD E. SEWARD and HELEN ROBERTS, Liquidating Trustees of CON-ROD EXCHANGE, INC., a Corporation, *Appellees.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION
HONORABLE LEWIS B. SCHWELLENBACH, *Judge*

BRIEF FOR THE APPELLEES

H. B. JONES,
Attorneys for Appellees.

610 Colman Building,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

No. 10235

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOR W. HENRICKSON, Acting Collector of Internal Revenue, *Appellant*,

vs.

RICHARD E. SEWARD and HELEN ROBERTS, Liquidating Trustees of CON-ROD EXCHANGE, INC., a Corporation, *Appellees*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION
HONORABLE LEWIS B. SCHWELLENBACH, *Judge*

BRIEF FOR THE APPELLEES

H. B. JONES,
Attorneys for Appellees.

610 Colman Building,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

TABLE OF CONTENTS

TABLE OF CASES

Page

TEXTBOOKS

STATUTES

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOR W. HENRICKSON, Acting Collector of Internal Revenue, *Appellant*, vs. RICHARD E. SEWARD and HELEN ROBERTS, Liquidating Trustees of CON-ROD EXCHANGE, INC., a Corporation, *Appellees.*	No. 10235

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE LEWIS B. SCHWELLENBACH, *Judge*

BRIEF FOR APPELLEES

STATEMENT

The transcript of proceedings before the court (R. 71 to 135) is disjointed and confusing, and most of it has no relation to the matters involved in this appeal.

As the case stood when it came on for trial, two general questions were presented: The first, whether the question of liability for the manufacturers sales tax had been adjudicated between the parties by pre-

vious decision in the controversy between them involving the period from October 1, 1935, to October 1, 1936; and, second, whether the operations for the period in question in this case, namely from 1932 to 1935, upon which the assessment was based, covered transactions that were purely repair and admittedly non-taxable, and should therefore be eliminated. More specifically, with respect to the latter point, the question was whether the agent, in setting up the tax, had included instances where the customer brought in his own connecting rods, had them repaired, and specifically returned to him, which is admittedly not subject to the tax, along with transactions where the customer exchanged his own worn out connecting rods for others which taxpayer had repaired. Most of the statement, argument and evidence included in the statement of facts concerned this latter point, and the possibility of reaching an understanding on it which would avoid the necessity of going into thousands of transactions occurring over the period of three or four years involved. This question was further complicated by the fact that there were no records available to the investigating agents for the period between 1932 and 1933 and they simply assumed a course and volume of business to have existed in those years comparable to the showing made by the records for the years 1934 and 1935. Before the conclusion of the hearing, after conference, the parties reached an agreement under which plaintiff abandoned any attempt to establish that any part of the assessment related to pure repairs as distinguished from exchanges (R. 129). It did, however, establish

that the tax for 1932 and 1933 was set up on an arbitrary or estimated basis without supporting records, determined with relation to the volume shown by the records for 1934 and 1935, under which, for the year 1932 there was assessed a tax of $300.31, a penalty of $50.09 and interest of $67.47; and for 1933 there was assessed a tax of $379.56, a penalty of $94.90 and interest of $92.99 (R. 129, 131).

On the other point of *res judicata*, upon which the court decided in taxpayer's favor, the evidence is very brief and may be stated simply as follows:

The assessment for the period in question in this case covers nothing but repairs and exchanges of connecting rods (R. 94, 95). With respect to these, there was no difference in the method of treatment, or handling, or the physical operations involved, during the period here in question, from the period covered by the proceeding before Judge Yankwich (R. 89, 93, 106). Appellant's counsel conceded "that the facts with respect to the actual manufactory, or repair, whichever you wish to call it, as set forth in Judge Yankwich's opinion, pertain to this period; I mean, the actual manufacture" (R. 106). The trial court found that the operations were identical in both periods (R. 57).

On the question of whether the tax was passed on to the customer, it was appreciated that of course the previous decision for one period would not be *res judicata* as to the other period and testimony on that point was offered (R. 107, 108, 111), from which the court found as a matter of fact that the tax was not added and passed on (R. 133, 134, 59).

ARGUMENT

In support of his appeal the appellant submits three contentions:

1. That the repair and exchange of connecting rods constituted a transaction subject to the manufacturers excise tax.

2. That the decision of Judge Yankwich in *Con Rod Exchange, Inc., v. Henricksen*, 28 F. Supp. 924, should not be considered as *res judicata* upon the question of whether such operations were subject to the tax as between these parties (R. 20, 32).

3. That Section 621 of the Revenue Act of 1932, prohibiting a refund unless taxpayer establishes that the tax has not been passed on, was not complied with.

Liability to Tax

The appellees will make no contention that the decision in the first case was legally correct, although in fairness to the Judge who decided that case, it should be recognized that there was then ample legal authority for the view which he took. That question, however, is no longer open to argument in view of the subsequent decisions of this court in *U. S. v. Armature Exchange*, 116 F.(2d) 969; *U. S. v. J. Leslie Morris Co.*, 124 F.(2d) 371; *U. S. v. Moroloy Bearing Service*, 124 F.(2d) 373, and therefore there is no occasion to consider or discuss the numerous foreign or federal cases cited or the legislative history of the Act as presented in the appellant's brief.

Passing On of Tax

As to the third point concerning the passing on of the tax, the appellees recognize that this is a condi-

tion or prerequisite to refund that must be met independently of the substantive right to recovery and may be subject to variation with each separate transaction. They agree that the doctrine of *res judicata* has no application to that particular question and to meet the requirement of the statute they offered positive evidence that the tax was not passed on to the purchaser.

The testimony showed that there was no change made in the price by reason of the tax and that in fact the taxpayer did not know anything about the tax on such transactions until long after they occurred. This was a question of fact (*Appeal of Arden-Rayshine Co.*, 43 B.T.A. 314 at 318) upon which the court made a definite finding in appellees' favor (R. 59, 133, 134). There was substantial evidence to support this finding (R. 106, 111). No evidence was offered to the contrary. The finding is conclusive and not subject to review upon this appeal. *U. S. v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386 at 407, 78 L. ed. 860 at 874; *Luzier's Inc. v. Nee* (C.C.A. 8) 106 F.(2d) 130, 39-2 U.S.T.C. §9657.

However, as a matter of interest in considering what showing of negative fact has been held sufficient in similar cases, see the following:

Ney v. U.S. (D.C. Va.) 33 F. Supp. 554. The fact that taxpayer continued to sell merchandise at the same prices charged before the tax was imposed was considered substantial evidence that it was not passed on.

Bullock's, Inc., v. U. S. (D.C.S.D. Cal.) 43 F. Supp. 861, 42-1 U.S.T.C. §9303. The fact that prices were fixed by managers or department heads who had no

information about the tax and testified that no increase in price was made because of it was considered substantial evidence that the tax was not passed on.

Poindexter and Sons v. U.S. (D.C. Mo.) 40 F. Supp. 787, 41-2 U.S.T.C. §9678.

Appeal of *Sophie Jaski*, 43 B.T.A. 321, holding that sale of the products at the same price after as before the tax went into effect established that they were not passed on.

Res Judicata

While the appellant makes a faint argument that the doctrine of *res judicata* is not applicable because this case did not involve exactly the same transactions embraced in the earlier suit, he concedes that they were comparable and similar. Appellant's counsel admitted at the trial that the physical operations of manufacturing or repairing were the same in the transactions involved in this case as found by the court in the earlier case (R. 106, See also R. 89, 93) and the court made a finding that the physical processes "were identical in their nature in this action and in the preceding suit" (R. 57).

Appellant does not seriously contend that the doctrine of *res judicata* is not well established by the federal decisions in tax cases, but seeks to avoid its application for two reasons:

1. It is contended that the later decisions holding such operations to constitute manufacture interject an additional fact requiring an exception under the doctrine of *Blair v. Commissioner*, 300 U.S. 5, 37-1 U.S.T.C. §9083. But in that case the court was dealing with a situation which required it to accept state

law as a controlling factor upon its decision, which state law had been changed between the time of the first and second cases. The court, with respect to that point said, "Here, after the decision in the first proceeding, the opinion and decree of the state court created a new situation. The determination of petitioner's liability for the year 1923 had been rested entirely upon the local law. *Comm. v. Blair*, 60 F.(2d) 340, 342, 344. The supervening decision of the state court interpreting that law in direct relation to this trust can not justly be ignored in the present proceeding so far as it is found that the law is determinative of any material point in controversy."

That decision obviously rests upon treating the controlling state law as a fact which was not identical but different in the two proceedings.

2. Secondly, it is claimed that an exception ought to be made and a different rule followed in an excise tax case on the basis of a restriction of the doctrine of *res judicata* with reference to decisions of the Court of Customs Appeals, as announced in *U. S. v. Stone & Downer Co.*, 274 U.S. 225, 71 L. ed. 1013. That case, however, must be restricted to its peculiar facts. It did not involve application of *res judicata* as established by the decisions of the Federal Court as a matter of general law but turned upon whether the Court of Customs Appeals, as a limited and special tribunal, was justified in adopting a different rule. The court pointed out that by the act creating that tribunal "the whole question of classification and refunding of duties was taken out of the jurisdiction of the regular federal judiciary. The classification by the Court

of Customs Appeals was made final, and no appeal was granted to this court," 274 U.S. at 232. Then after pointing out that it was not until the Act of August 22, 1914, that a limited review was given to the Supreme Court and that during the interim the Customs Court of Appeals was final and conclusive, both as to the law, the fact and its rules of conduct, it said,

> "It was thus for five years put in a position where it must not only make its own rules but it must determine, as a practical matter, what should be the conclusive effect of its own judgments in the determination of questions of fact and statutory construction and classification in subsequent cases brought before them by the same parties and presenting similar issues. In the exercise of this jurisdiction, it established the practice that the finding of fact and the construction of the statute and classification thereunder as against an importer was not *res judicata* in respect of a subsequent importation involving the same issue of fact and the same question of law." 274 U.S. 233, 234.
>
> * * * * * * * *
>
> "There would seem to be an analogy between the proper respect of this court for the conclusion of the court of customs appeals upon the question of the estoppel of its own decisions when it was an independent court not subject to review by this court, and our respect for judgments of the state courts in limiting the application of the estoppel of their decisions in tax cases, and unless some controlling reason exists why we should overrule the established practice in this matter of the court of customs appeals, now that the power of review of some of its judgments has been given us, we should follow it." 274 U.S. 235.

The application of this case and the portion quoted by appellant at page 21 of his brief is therefore limited and controlled as set forth above, making it applicable only to that special situation. That it has no proper relation to the general application of *res judicata* to tax cases in the Federal Court is recognized by this court in *Lee Co. v. U.S.* 41 F.(2d) 460, in which, after approving the general doctrine of *res judicata*, it is said:

> "By appellee reliance is had on *United States v. Stone & Downer Co.*, 274 U.S. 225, 47 S.Ct. 616, 71 L. ed. 1013. But the court was there reviewing a judgment of the Court of Customs Appeals exercising jurisdiction in a special field of litigation quasi administrative, and it was accordingly held not only that the Customs Court was within the exercise of the power conferred upon it by Congress in declining, because of the distinctive character of the controversies coming before it, to recognize the rule of *res adjudicata*, but that such recognition would be unwise. We find little analogy between that case and this, and in it no warrant for extending, to a familiar class of litigation, a ruling limited in its reasoning to a new and distinctive field."

While it is suggested that the reason supporting the rule of the Court of Customs Appeals in customs cases ought to be applied to excise tax cases, because the taxpayer who is benefited by the doctrine may obtain some advantage over his competitors, we see nothing peculiar to the excise tax law in that situation. The advantage of such a taxpayer is no different in kind from the advantage enjoyed by reason of application of the doctrine in *New Orleans v. Citi-*

zens' Bank, 167 U.S. 371, 12 S. Ct. 905, 42 L. ed. 202, which we shall discuss at greater length hereafter; nor from the situation existing in *Lee Co. v. Federal Trade Comm.* (C.C.A. 8) 113 F.(2d) 583, where the doctrine of *res judicata* was applied to prevent successive condemnations under the Food and Drug Act.

Numerous cases are cited by the appellant which do not question the doctrine or its general application to tax cases, but hold it inapplicable because of a change or lack of identity in the facts (Appellant's brief, pages 23, 25, 27). Such are the cases involving the question of whether the activities of a club are social in character from year to year, of which the decision of the Court of Claims in *Engineers Club of Phila. v. U.S.*, 42 F. Supp. 182, 187, 42-1 T.C. §9255, is an extreme example. But in that case the court pointed out as the basis for its decision that "the facts were, as we have said, not identical. They were a different, though similar, set of events. They consisted of a whole course of conduct from day to day in all its detail of an enterprise of considerable scope. They were the kind of events which, though similar, might easily vary from period to period enough to change the judgment of the same tribunal though it held the same view of the meaning of the applicable statute." Judge Whitaker, concurring specially, expressed the opinion that *res judicata* was applicable under the decisions of the Supreme Court but thought that the plaintiff could not recover for other reasons. While the Supreme Court denied certiorari, its decision may well have been predicated on these other grounds.

We see no necessity for further discussion of these

cases, involving different or varying sets of facts, in view of the evidence and findings in this case that the facts with respect to manufacture affecting the statutory liability were identical with those in the earlier proceeding (R. 57).

3. Whatever may be the criticisms or objections to the doctrine of *res judicata* it is well established as a principle of Federal Law applicable to tax cases.

The general principle is stated in 2 Freeman, Judgments (5th ed. 1925) Sec. 627, 1322, as follows:

> "An existing final judgment or decree rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties or their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue and adjudicated in the first suit."

A leading case on *res judicata* in tax suits is *New Orleans v. Citizens' Bank* (1897) 167 U.S. 371, 12 S. Ct. 905, 42 L. ed. 202. In that case an assessment sought to be made upon the stock of a bank was challenged upon the ground that the bank's charter rendered its stock exempt from taxation. This contention based upon the same charter had been sustained in a suit involving taxes assessed for a previous year. The Supreme Court of the United States held that the prior determination was conclusive of the invalidity of the later assessment. Involving as it did the assessment of a tax for a different period from that with respect to which the prior judgment had been entered, this case thus dealt squarely with the question of the effect of the principle of *res adjudicata* upon a claim

different from that existing in a prior action. All courts are agreed that a judgment in a tax suit is binding on the parties with respect to that particular assessment or liability and appellant herein raises no question as to the validity of this principle.

The decision, however, in *New Orleans v. Citizens' Bank, supra*, goes farther than to recite this general rule, and the extension of the general principle to application to the present case is established by the language of the court in the *Citizens' Bank* case at page 396:

> "The proposition that because a suit for a tax of one year is a different demand from the suit for a tax of another, therefore *res judicata* cannot apply, whilst admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies * * *."

The court in the *Citizens' Bank* case in setting forth the rule and its limitations, also quoted from the case of *Cromwell v. Sac County*, 94 U.S. 353, 24 L. ed. 198:

> " 'But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases,

therefore, where it is sought to apply the estoppel of the judgment rendered upon one cause of action to the matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated or determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.' "

Further substance in support of the contention that *res judicata* must apply in the proceedings at bar is to be found in the opinion in the *Citizens' Bank* case, *supra*, at page 398.

"It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if in the prior cases the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.

"The argument that as a matter of public policy the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the law-making and not to the judicial departments."

Reference should also be made to this opinion at page 401 in which Mr. Justice White quotes as follows from the case of *Goodnow v. Litchfield*, 59 Iowa 226:

" 'It is undoubtedly true that the taxes of each year ordinarily constitute separate and distinct rights or causes of action. But where an action is brought to recover taxes paid in one year, and an action is afterwards brought to recover for

> the taxes paid in a subsequent year, and the adjudication in the first is pleaded as a bar to the recovery in the second action, the question whether the estoppel is effectual will depend upon the issues in the two actions. If the right to recover and the defense thereto are based upon precisely the same grounds, why litigate again the question that has been determined? In such case the very right of the matter has been determined by a court of competent jurisdiction. It is not essential the causes of action should be the same but it is essential the right or title should be; that is the issue in both actions and the matter on which the estoppel depends must be the same, or substantially so. * * * ' "

The application of the rule of *res judicata* to cases involving different causes of action is so well established as to not require extensive citation of authority in support of it. Brief reference, however, will here be made to several of the other leading cases supporting this rule. Thus, in *Southern Pacific Railroad Company v. United States* (1897) 168 U.S. 1, 18 S. Ct. 18, 42 L. ed. 355, the court at page 48 stated the rule that:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains

> unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

See to the same effect *Oklahoma v. Texas* (1921) 256 U.S. 70, 41 S. Ct. 420, 65 L. ed. 831; 2 Freeman, Judgments (5th ed. 1925) Section 627.

The rule as stated in the *Citizens' Bank* case and other authorities cited, *supra*, has without question been applied to cases arising under the income and estate tax laws. The leading case holding to this effect is *Tait v. Western Maryland Railway Company* (1932) 289 U. S. 620, 53 S. Ct. 706, 77 L. ed. 1405, which should be decisive of the question involved in the proceedings at bar. In that case the original proceedings involved the question of the validity of the Commissioner's refusal to allow as a deduction from gross income for the taxable years 1918 and 1919 of the plaintiff an amortized proportion of the discount on the sale of bonds by two companies, of which the plaintiff was the successor. On appeal from a decision of the Board of Tax Appeals, judgment was entered for the plaintiff taxpayer. During the period from 1920 through 1925 deductions for amortization of the bond discount in question were either not taken or not

allowed, and for each year suit was brought against the collector for refund. The cases were consolidated in the District Court, which found no facts to have been presented which had not been before the Board of Tax Appeals in respect to the 1918 and 1919 taxes and that the parties were concluded by the former decision. This judgment was affirmed in the Circuit Court of Appeals and an appeal was taken therefrom by the Collector to the Supreme Court. The Collector maintained that a judgment in a suit concerning income tax for a given year could not estop either party in a later action touching liability for taxes of another year, and, in the alternative, that he was not precluded by the former judgment because neither the proof nor the parties were the same as in the prior proceeding. As to the first contention, the court stated in 289 U.S. 620 at page 624:

> "As petitioner (Collector) says, the scheme of the Revenue Acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status.
>
> "This court has repeatedly applied the doctrine of *res judicata* in actions concerning State taxes * * *. It cannot be supposed that Congress was oblivious of the scope of the doctrine and in the absence of a clear declaration of such purpose, we will not infer from the annual nature of the exaction an intent to abolish the rule in this class of cases.

> "We are not persuaded that the operation of the principle of the thing adjudged in tax cases will, as petitioner insists, produce serious inequalities or result in great confusion; but any adverse consequence in the administration of the law furnishes no sufficient reason for the abandonment of a rule founded in sound policy, to the enforcement of which suitors are in justice entitled."

Cases holding in accord with this decision and following its rule include:

Leininger v. Commissioner (C.C.A. 6, 1936) 86 F. (2d) 791;

Greenbaum v. U. S. (Ct. Cls. 1936) 17 F. Supp. 83;

Pink, etc. v. U. S. ..... F. Supp. ..... (1938) 38-1 U.S.T.C. Par. 9084, rev'd on other grounds (C.C.A. 2, 1939) 105 F.(2d) 183;

Pryor & Lockhart Development Co. v. Commissioner (1936) 34 B.T.A. 687.

The Supreme Court in the *Western Maryland Railway* case regarded as of primary importance the question: Is the question or right here in issue the same as that adjudicated in the former action? The court, in answering its own question in the affirmative found (289 U.S. 625) that the pertinent language of the Revenue Act was identical; that the Regulations remained unchanged; and that the facts with respect to the sale of the bonds and the successive ownership of the railroad property were the same at the time of both trials and concluded that the right then con-

tested, arising out of the same facts appearing in this record, was adjudged in the prior proceedings.

Can it be said that the situation presented in the proceedings at bar is different from that in the *Western Maryland Railway Company* case? Appellees submit that it cannot. Here again no substantial change appeared in the applicable provisions of the Revenue Act or in the Regulations issued by the Treasury; and the facts here with respect to the transactions involving rebabbiting of connecting rods are identical in all the periods in question, including the period as to which judgment has already been rendered. That judgment determined that such transactions did not constitute manufacturing of automobile accessories within the meaning of the federal excise tax law. No distinction may be drawn between an adjudication on the one hand that certain bond discount is allowable and an adjudication on the other hand that a certain corporation's activities do not constitute taxable transactions, where it is shown that the transactions in no wise differed during the taxable periods in question except in respect to the time element.

In *North St. Louis Gymnastic Society v. Hagerman* (Mo. 1911) 135 S.W. 42, in which case the liability of the society turned upon the question whether it had used its property during the taxable year solely for "educational" purposes, the court held that the issue was *res judicata* since substantially similar use during a previous year had been adjudged "educational."

See to the same effect:

People ex rel. Harding v. Omega Chapter (Ill. 1929) 167 N. E. 16;

Chicago M. & St. P. R. Co. v. Racine (Wis. 1904) 100 N. W. 1033;

Denver v. Colorado Seminary (Colo. 1934) 41 P. (2d) 1109.

Considerations, consisting of a general interest in the termination of disputes and the right of an individual to be protected from a vexatious multiplication of suits in which repeated adjudications of the same matter are sought, compelled the Court in the *Western Maryland Railway* case to apply *res judicata* to tax cases. They are just as strongly applicable to disputes between the government and an individual as they are to controversies between individuals and so the Court found in the *Western Maryland Railway* case. No less strongly do they apply in cases involving excise rather than income taxes; in fact, the necessity for protection from vexatious litigation would seem to be more pressing in the former case because of the fact that assessment and collection of the manufacturer's excise tax occurs with greater frequency and covers shorter periods than in the case of the income tax. Conceivably, it might be necessary for a taxpayer in the position of the appellees to secure, through Court proceedings, a refund of a tax illegally collected for one month, and subsequently be compelled to bring the same sort of proceedings the following month to recover the taxes paid during the latter period, were it not for the protection afforded by the rule upon which appellees herein rely. Where a different decision is later reached on a similar set of facts, the remedy for any inequality alleged to result from exemption of a particular taxpayer by rea-

son of the prior decision lies in amendment of the particular statute in question to accord with what has been found to be the sounder view. But as the Court has indicated in the *Western Maryland Railway* case, efforts to correct the situation on the part of the government should be directed to the legislative body and no alleged policy in that regard is so strong as to compel a Court to disregard its own prior adjudication.

Reference may be made to an interesting article in Paul's Selected Studies in Federal Taxation, 2nd series, at page 104, entitled "Res Judicata in Federal Taxation." But neither the progressive views of this author, nor of Professor Griswold, whose article similarly entitled, 46 Yale Law Journal, 1320, is relied upon by the appellant, go so far as to suggest that a distinction should be made between excise and other tax cases, or invite the application of the special rule adopted by the Court of Customs appeals. The argument against superior advantage to the taxpayer (appellant's brief p. 20) applies just as logically to the benefit resulting to the taxpayer in *New Orleans v. Citizens Bank*, 167 U.S. 371, 12 S. Ct. 905, 42 L. ed. 202, under which the bank enjoyed continuing exemptions from taxation of its stock, to the disadvantage of its competitors. Granting that inequalities do result in particular cases, the principle has been adopted and sustained on the basis of greater public benefit resulting from an end of litigation. If this is a situation which is thought undesirable, it should, and may at any time, be changed by legislation.

CONCLUSION

The doctrine of *res judicata* and its application to tax cases, as recognized in the foregoing authorities, is so well established that appellant has not seriously sought to question it but only to escape it on the ground of a difference in facts or that a special exception should be made as regards excise taxes. Since the factual situation is found to be identical, there is no basis for that distinction; nor is there any precedent or authority for making a special exemption or exception because of the nature of the tax, on the basis of the decision in the *Stone & Downer* case, in view of the limitations of the decision in that case and the reasons for its nonaplicability to this case pointed out in *U. S. v. Lee Co., supra.* Since appellant did not see fit to appeal from the earlier decision, it is binding between these parties in the disposition of this case.

Respectfully submitted,

JONES & BRONSON,
H. B. JONES,
Attorneys for Appellees.